(2)

No. 98-1487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL D. DIEDERICH, JR.,

Petitioner,

v.

THE COUNTY OF ROCKLAND; C. SCOTT VANDERHOEF, COUNTY EXECUTIVE and PAUL NOWICKI, COUNTY ATTORNEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a decision by the United States Court of Appeals for the Second Circuit holding that the First Amendment does not protect petitioner, an assistant county attorney, from a politically-motivated dismissal should be reviewed by this Court even though the decision below neither presents a novel question of federal law, nor conflicts with any decision of this Court or of any other circuit.

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1 Ronald Rotunda & John Nowak, *Treatise on Constitutional Law*, § 3.4 (2d ed. 1992 & Supp. 1999) 25

Respondents respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's opinion below. That unpublished opinion is at 1998 U.S. App. LEXIS 31460 (2d Cir. Dec. 15, 1998) and is reprinted in the petition for certiorari at Appendix A. Petitioner, Michael Diederich, grossly distorted the facts relevant to the powers, responsibilities and status of assistant county attorneys in Rockland County in his petition because as detailed below, Mr. Diederich held a confidential, policy making position. Accordingly, party affiliation was an appropriate requirement for effective performance of his job.

This action arises from precisely the same facts that gave rise to the Second Circuit's opinion in *Gordon v. County of Rockland*, 110 F.3d 886 (2d Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 74 (1997). The primary issue here, as in *Gordon*, is whether applying this Court's rulings in *Elrod v. Burns*, 427 U.S. 347 (1976) and its progeny, a confidential, policy making assistant county attorney is protected by the First Amendment from a politically-motivated dismissal. The answer of *all* the circuit courts that have directly addressed this issue is an unequivocal "no."

There is no cause for this Court's review of the conclusion below that Mr. Diederich was not entitled to First Amendment protection from dismissal.

STATEMENT OF THE CASE

In June 1992 Mr. Diederich was hired by Rockland County on a part-time basis as an environmental lawyer, with the title of Assistant County Attorney. (JA 21).[1] By statute, Mr. Diederich

1. Because the appendix submitted by Mr. Diederich does not fully recite the factual record, citations to "JA __" refer to the more complete Joint Appendix submitted to the Second Circuit.

employment was at the pleasure of the County Attorney and revocable at any time. N.Y. County Law § 502 (McKinney 1991 & Supp. 1998) ("[a]ny such appointment may be revoked by the county attorney at any time"). Moreover, for purposes of financial disclosure, as an assistant county attorney, Mr. Diederich was designated as a "policymaker" by the Rockland County Legislature. *See Laws of Rockland County*, Code of Ethics, § 66.11.1, Schedule A(D)(2) (1992).

According to the job description current at the time of Mr. Diederich's hiring, the duties and responsibilities of a Rockland Assistant County Attorney included:

> **DISTINGUISHING FEATURES OF THE CLASS:**
>
> This is professional legal work of a complex legal nature involving the responsibility for representing the County in court cases and in the performance of other legal work. General supervision is received from the County Attorney. Does related work as required.
>
> **TYPICAL WORK ACTIVITIES:**
>
> Researches the law and renders opinions to the County Legislature and department heads as directed by the County Attorney;
>
> Prepares pleadings, appeals, resolutions, notices, contracts and other legal papers and documents;
>
> Examines legal papers served on or filed with County departments; Appears in Court or at hearings to represent the County.

FULL PERFORMANCE KNOWLEDGE, SKILLS, ABILITIES AND PERSONAL CHARACTERISTICS:

Good knowledge of the principles and practices of law, particularly as concerned with the organization and operation of County departments and agencies; ability to express arguments of the law by written and spoken words; ability to deal effectively with people; physical condition commensurate with the demands of the position.

MINIMUM QUALIFICATIONS:

Possession of a license to practice law in the State of New York.

(JA 49).

Consistent with this job description, in early 1994, Mr. Diederich prepared a summary of his duties and responsibilities which, in pertinent part, states:

> . . . I have been involved in a wide variety of other environmental law matters as the need has arisen. For example, I filed a NEPA lawsuit on the County's behalf in *County of Rockland et al. v. U.S. Army Corps of Engineers* (U.S. District Court, S.D.N.Y. 1993), and have defended the County and its employees in various DEC proceedings. I have also been advising on all aspects of the Court Facilities project, including SEQR. I continue to work closely with the Rockland County Environment Management Council (I was an EMC chairman in the early 1980s).

* * *

Committee, etc., meetings

Solid Waste Management Department — I meet on a regular and ongoing basis with the head of this department.

Solid Waste Management Department, Executive Work Staff — Monthly meetings, an as otherwise scheduled.

Legislative Solid Waste Management Committee — I serve as this committee's counsel.

Legislative Court Facilities Committee — I have been serving as this committee's legal advisor, pending the assignment of another attorney. My initial involvement was on SEQR issues, which involvement I expect should continue.

Legislative Water Quality Committee — I have been serving as counsel to this committee.

Emergency Planning — I have been involved on an "as needed" basis, for example, on Indian Point drills.

Environmental Management Council — I work closely with the EMC, and often attend their meetings.

(JA 47-48).

Assistant county attorneys in Rockland County are under the supervision of the County Attorney, who is appointed by

the elected County Executive. *See Gordon*, 110 F.3d at 891. In November 1993 a Republican was elected as Rockland's County Executive and appointed a Republican, as County Attorney. (JA 22). In March 1994, the County Attorney terminated the employment of Mr. Diederich, a registered Democrat as well as the employment of the plaintiffs in *Gordon*, all of whom were registered Democrats. *Gordon*, 110 F.3d at 887. Mr. Diederich's job description, title, and status are identical to those of the *Gordon* plaintiffs. Mr. Diederich here and each of the part-time assistants in *Gordon*, however, had distinct areas of responsibility and specialization. *See Gordon*, 110 F.3d at 888.

On the basis of the incidents described above, the *Gordon* former assistant county attorneys brought suit alleging that their dismissal was politically motivated and violated the First Amendment. *Gordon*, 110 F.3d at 887. In *Gordon*, following the reasoning of the Supreme Court in *Branti v. Finkel*, 445 U.S. 507 (1980), the Second Circuit held that "rendering legal opinions, drafting ordinances, [and] negotiating contracts — define a position for which party affiliation is an appropriate requirement," *Gordon*, 110 F.3d at 891 (quoting *Ness v. Marshall*, 660 F.2d 517, 521-22 (3d Cir. 1981)), and held that "the Assistant Rockland County Attorneys are . . . exempt from First Amendment protection against politically motivated dismissal." *Gordon*, 110 F.3d at 892. This Court denied the *Gordon* plaintiffs' petition for certiorari.

Mr. Diederich served his action after the Second Circuit ruled in *Gordon*. In his amended complaint Mr. Diederich asserted that his First and Fourteenth Amendment rights were violated when he was terminated from the County's employ. (JA 24, 27). He also asserted that the County's decision to terminate some part-time, but no full-time, assistant county attorneys violated his right to "equal protection." (JA 27-28). In-

addition, Mr. Diederich alleged that the County's supposed failure to pay him certain benefits constituted an unconstitutional taking within the meaning of the Fifth Amendment. (JA 29-30). Mr. Diederich further alleged that dishonesty of elected officials regarding the reasons for his termination "harms democracy and the Republican form of government" and that taxpayers suffered financially due to this deception. (JA 31). Finally, Mr. Diederich alleged that taxpayers suffered because the County failed to meet obligations established in its Solid Waste Management Plan which Mr. Diederich claimed he prepared. (JA 33).

On April 3, 1998 the district court granted respondents' motion to dismiss and denied Mr. Diederich's cross-motion for summary judgment as well as his motion for leave to file a supplemental complaint. *Diederich v. County of Rockland*, 999 F. Supp. 568 (S.D.N.Y.), *aff'd*, 166 F.3d 1200 (2d Cir. 1998). In addition, the district court denied respondents' motion for sanctions, but noted that Mr. Diederich's action "approaches the boundaries of sanctionable conduct. . . ." *Id.* at 574.

On December 15, 1998, the Second Circuit affirmed the dismissal of Mr. Diederich's claims stating that they "involve[ ] precisely the same factual and legal arguments that we recently rejected in *Gordon v. County of Rockland*." (App. 2a).[2] Accordingly, Mr. Diederich's First Amendment claim was rejected "for substantially the reasons stated in *Gordon*." (*Id.*)

The certiorari petition filed by Mr. Diederich is almost identical to the unsuccessful petition in *Gordon*.

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2. Citations to "App __" refer to the appendix submitted by Mr. Diederich.

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT'S DECISION DOES NOT RAISE AN IMPORTANT ISSUE THAT CALLS FOR THIS COURT'S REVIEW

A. The Circuits Agree That Similarly Situated Attorneys Do Not Enjoy First Amendment Protection

The precedents upon which the decision below turns are well-settled. In *Elrod*, this Court carved an exception to the general rule that patronage dismissals violate the First Amendment and exempted employees in policy making positions and those privy to confidential matters from First Amendment protection. 427 U.S. at 367. In *Branti*, this Court refined the standard in *Elrod*:

> [T]he ultimate inquiry is . . . whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518. (hereinafter the "*Branti* standard"). In deciding that assistant public defenders enjoyed protection from patronage dismissals, this Court specifically contrasted the broader public responsibilities of prosecutors. *Branti*, 445 U.S. at 519 n.13.

Though circuit courts have sometimes wrestled with the application of the *Branti* standard, the courts recognize "[t]his difficulty 'is the natural result of the myriad of governmental bodies, departments, and positions, and the varying responsibilities of pubiic employees.' " *Waskovich v. Morgano*,

2 F.3d 1292, 1297 (3d Cir. 1993), quoting *Pounds v. Griepenstroh*, 970 F.2d 338, 341 (7th Cir. 1992), *cert. denied*, 507 U.S. 910 (1993). With respect to attorney positions, however, the circuit courts are uniform in holding that government attorneys are not protected against politically motivated discharges. *See Fazio v. City And County of San Francisco*, 125 F.3d 1328 (9th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1517 (1998); *Americanos v. Carter*, 74 F.3d 138 (7th Cir.), *cert. denied*, 517 U.S. 1222 (1996); *Monks v. Merlinga*, 923 F.2d 423 (6th Cir. 1991); *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990); *Clark v. Brown*, 861 F.2d 66 (4th Cir. 1988); *Bauer v. Bosley*, 802 F.2d 1058 (8th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987); *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983); *Mummau v. Ranck*, 531 F. Supp. 402 (E.D. Pa), *aff'd per curiam*, 687 F.2d 9 (3d Cir. 1982); *Ness*, 660 F.2d at 522.

This Court should not and need not review each of the decisions that comprise the progeny of *Elrod* and *Branti* as Mr. Diederich suggests because when it comes to government attorneys — who interact with elected officials, represent governmental agencies in important matters and render opinions to County Legislatures — the circuit courts have had no difficulty reaching the conclusion that the First Amendment does not prevent their discharge. Thus, there is no open or important issue to review as evidenced by this Court's denial of certiorari in *Gordon*.

B. The Second Circuit's Ruling Is Consistent With *Branti*

Mr. Diederich repeatedly takes issue with what he describes as the Second Circuit's " 'shared ideology' approach to patronage discharge cases," which "dispens[es] with this Court's teachings that political discharge requires that political affiliation be necessary for effective job performance." (Petition at 8-15) (characterizing the Second Circuit's analysis as "novel").

The opinion below, however, does not mention this "shared ideology" approach. As it has done in several prior cases, the Second Circuit here applied the eight factors identified in *Vezzetti v. Pellegrini*, 22 F.3d 483 (2d Cir. 1994), to determine that the First Amendment did not protect from a government attorney discharge. In both this case and in *Gordon*, the teachings of *Branti* were closely followed. Indeed, *Gordon* explicitly recognized that *Branti* requires a court to focus on whether "party affiliation is an appropriate requirement for effective job performance." 110 F.3d at 887 (quoting *Branti*). *Gordon* also recognized that the *Branti* standard is satisfied "when there is a rational connection between shared ideology and job performance." *Gordon*, 110 F.3d at 889. The analysis applied to this case is consistent with this rule and Mr. Diederich never explains how or why the ruling below is inconsistent with *Branti*. In fact, the Second Circuit's decision here follows *Branti's* dictates that "if an employee's private *political beliefs* would interfere with the discharge of his public duties, his First Amendment rights may be required to yield . . . ," and that a high-ranking government official "may appropriately believe that the official duties of various assistants . . . cannot be performed effectively unless those persons *share his political beliefs* and party commitments." *Branti*, 445 U.S. at 517-518 (emphasis added).

When faced with a *Branti* issue,

> a court's function . . . is to do what courts are often called upon to do — to weigh all relevant factors and make a common sense judgment in light of the fundamental purpose to be served.

Jiminez Fuentes v. Torres Gaztambide, 807 F.2d 236, 242 (1st Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987). This is exactly what the Second Circuit did here. Because the decision below

in no way conflicts with *Branti* or any of the other relevant decisions of this Court, there is no basis for review.

C. The Second Circuit Correctly Analyzed Mr. Diederich's Duties In Applying The *Branti* Standard

Mr. Diederich argues that review should be granted because the Second Circuit only examined the inherent or "paper" duties of his position and that this analysis violated this Court's ruling in *Branti* as well as conflicts with the decisions of other circuits. (Petition at 16). This claim, which also was raised by the *Gordon* plaintiffs, is based on a misreading of *Branti* and a mischaracterization of the lower court's analysis in this case.

Here, the district court examined more than just the written Assistant County Attorney job description because it specifically noted that it considered "the Retainer Agreement signed by [Mr. Diederich] describing [his] duties." (App. 4 n.1). Not only is Mr. Diederich wrong with respect to the factual underpinnings of the decision below, but his legal argument for review is erroneous — there is no intra-circuit conflict. In *Branti*, this Court, "having [ ] framed the issue" around the duties entailed in the particular position at issue, proceeded to analyze the "responsibilities" of the attorney position. *Branti*, 445 U.S. at 1295. The cases relied on by Mr. Diederich (Petition at 16-17) demonstrate that courts interpret *Branti* to require that in the context of the relevant facts of each case, the powers inherent in the position and the duties actually performed be considered. *See Peters v. Delaware River Port Auth. of Penn. and N.J.*, 16 F.3d 1346, 1353 (3d Cir.) (noting that analysis implicates "function[s] of the public office" as well as "actual duties performed"), *cert. denied*, 513 U.S. 811 (1994); *Waskovich*, 2 F.3d at 1297 (examined functions performed as well as inherent functions).

In certain cases — like this one — courts need look no further than the inherent duties of the position to apply the *Branti* standard. *See, e.g.*, *Peters*, 16 F.3d at 1353. Here, Mr. Diederich's self-described actual duties were, if anything, narrower than those inherent in the position. Therefore, the Second Circuit's reliance on his job description was justified. (JA 64-65).

The analysis employed in *Peters,* a case trumpeted by Mr. Diederich as being in conflict with this case, is consistent with the Second Circuit application of the *Branti* standard. In *Peters* the Third Circuit recognized that the functions of the public office in question controls, *not* the actual past duties of the particular employee. *See Peters*, 16 F.3d at 1353. The *Peters* court further explained that

> the actual past duties of the discharged employee are *irrelevant* if the position inherently encompasses more expansive powers and more important functions that would tend to make political affiliation an appropriate requirement for effective performance.

Peters, 16 F.3d at 1353, *quoting O'Connor v. Steeves*, 994 F.2d 905, 911 (1st Cir.), *cert. denied sub nom., Town of Nahant, Mass v. O'Connor*, 510 U.S. 1024 (1993) (emphasis added). The other Third Circuit case cited by Mr. Diederich, *Waskovich*, 2 F.3d at 1297-98, reached the same conclusion and more recent Third Circuit cases confirm this view, *see Wetzel v. Tucker*, 139 F.3d 380, 384 (3d Cir. 1998) (the inquiry "is focused on the function of the public office in question and not the actual past duties of the particular employee involved").

The analysis employed by the Second Circuit in this case also is consistent with the Eleventh Circuit's analysis in *Parrish*

v. Nikolits, 86 F.3d 1088 (11th Cir. 1996), *cert. denied*, 520 U.S. 1228 (1997). *Parrish* stands for nothing more than the unremarkable proposition that "inherent powers and actual job responsibilities . . . should be part of the analysis," *Parrish*, 86 F.3d at 1093, and Mr. Diederich's assertion (Petition at 17) that *Parrish* "pointedly rejected the Second Circuit's narrow approach" is simply not true. When appropriate, the Eleventh Circuit only has looked to an individual's job description to determine whether First Amendment protection from a politically motivated dismissal exists. *See Gordan v. Cochran*, 116 F.3d 1438 (11th Cir. 1997).

D. There Is No Conflict Between The Second Circuit And The Other Circuits As To Whether The Application of The *Branti* Standard Is A Question Of Law Or Fact

Mr. Diederich maintains that this Court should grant his petition to settle an intra-circuit conflict as to whether the *Branti* standard is a question of law or one of fact. An analysis of the cases reveals that this argument, like the others Mr. Diederich advances, is meritless.

In *Branti*, this Court instructed that the ultimate issue in a political termination case is whether, taking into account the specific facts of the particular situation, party affiliation is an appropriate requirement for the effective performance of the position involved. *Branti*, 445 U.S. at 518. The circuit courts, including the court below, consistently have viewed this question as "one in which a mixture of historical facts to be determined by the trier of fact and a test of constitutional law is involved." *Horton v. Taylor*, 767 F.2d 471, 478 (8th Cir. 1985); *see also Mumford v. Basinski*, 105 F.3d 264, 270 (6th Cir.), *cert. denied*, 118 S. Ct. 298 (1997) (finding as matter of law that position was "not protected by the First Amendment"). In other words,

in certain cases both questions of fact and law will exist — the nature of the job at issue may involve issues of fact — but the ultimate constitutional question is one of law. Mr. Diederich fails to see this important distinction.

The Second Circuit's decision below falls in line with the other appellate courts that have addressed this issue and have held that patronage dismissal of similar government attorneys, other than assistant public defenders, did not violate the First Amendment. *See, e.g.*, *Bauer*, 802 F.2d at 1062 (staff legal assistant in Office of Clerk of Circuit Court); *Brown v. Trench*, 787 F.2d 167, 169-70 (3d Cir. 1986), *aff'd*, 829 F.2d 30 (1987) (city solicitor and assistant district attorney); *Livas*, 711 F.2d at 800-01 (public prosecutor); *Ness*, 660 F.2d at 522 (city solicitor and assistant solicitor); *Mummau*, 531 F. Supp. at 404-05 (assistant district attorney).

The district court in *Gordon* submitted two issues to the jury: (1) whether the assistant county attorneys were terminated for political reasons; and (2) whether those terminations were constitutional violations. The Second Circuit held that this second issue, the constitutional question, based on certain undisputed facts, was a question of law. Therefore, it properly found that the district court erred in submitting the question to the jury. *Gordon*, 110 F.3d at 887. The Second Circuit in this case correctly stated that Mr. Diederich's claim "involves precisely the same factual and legal arguments that we recently rejected in *Gordon*." (App. 1a).[3] Accordingly, the court below was entirely justified in concluding that the reasoning of the *Gordon* case applied with equal force to Mr. Diederich's claims.

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3. Significantly, Mr. Diederich does not dispute that the facts of this case and *Gordon* are indistinguishable. Moreover, he affirmatively seeks to rely on testimony elicited in *Gordon* in support of his petition to this Court. (Petition at 4-6).

Mr. Diederich claims that the question of whether a termination violates the First Amendment always must be a question of fact. Merely restating this argument demonstrates its fatal flaw. When dealing with government attorneys, the nature of the position can present questions of law. For example, in *Bauer v. Bosley* the Eighth Circuit found that the nature of the position at issue was clear from the record and that, therefore, it was unnecessary and error for the district court to submit the question to the jury. *Bauer*, 802 F.2d at 1062. Conversely, in *Soderbeck v. Burnett County*, the Seventh Circuit found that the question regarding the nature of a position within a sheriff's office was sufficiently uncertain as to render it a question of fact for the jury. *Soderbeck v. Burnett County*, 752 F.2d 285, 288 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985). In *Delong v. United States*, 621 F.2d 618, 623 (4th Cir. 1980), the Fourth Circuit employed the same analysis and found that the issue "may be resolved as one of law or fact depending upon the evidence adduced" *and* remanded the case for reconsideration in light of this Court's ruling in *Branti*.

Put simply, Mr. Diederich "confuses the idea of an *issue of fact* with that of a *fact-specific inquiry*." *Gordon*, 110 F.3d at 889 n.3 (emphasis in original). There is no intra-circuit conflict that necessitates review of this question because Mr. Diederich admits that "the material facts are undisputed here." (Petition at 3). Clearly, the Second Circuit was correct in determining that, based on undisputed facts, Mr. Diederich was not entitled to protection from politically based dismissal.

E. The Decision Below Is Not "Sweeping" And Does Not Create An Inappropriate *Per Se* Rule

Mr. Diederich completely mischaracterizes the ruling below by stating that it creates a "categorical rule of exclusion" whereby

all public attorneys are *per se* foreclosed from First Amendment protection. (Petition at 18-19).

The Second Circuit did not create a *per se* rule in its decision. To the contrary, the Second Circuit specifically noted that Mr. Diederich's civil service status was only "one factor to be considered in determining whether a public employee is protected by the First Amendment from a political dismissal." (App. 2a). Citing to *Vezzetti*, 22 F.3d at 486, the court below stated that "no one factor is dispositive," and that the *Vezzitti* factors "should not be mechanically applied, nor should they begin or end the analysis."

Nor did *Gordon* create any *per se* rule. Applying the *Branti* standard, the *Gordon* Court looked to the nature of the Mr. Diederichs' jobs as well as the duties they performed and found that these positions were ones where party affiliation was an appropriate requirement for job performance. *Gordon*, 110 F.3d at 892. The duties performed by Mr. Diederich and the *Gordon* plaintiffs — being privy to confidential information held by elected officials implementing government policy, litigating on the County's behalf and representing the County in legislative committees — can hardly be characterized as "ministerial functions" and other courts similarly have looked to these factors to decide that a position was not entitled to *Branti* protection. *See, e.g.*, *Williams*, 909 F.2d at 154 (city attorney not protected under *Branti* because position entailed defending city against suits concerning policy disputes and negotiating for city in contract disputes); *Jiminez Fuentes*, 807 F.2d at 243-44 (Regional Directors of Urban Housing and Development Corporation not protected under *Branti* because such "confidential" employees participate in policy formation); *Bauer*, 802 F.2d at 1062 (staff legal assistant to circuit court clerk not protected under *Branti* because position entailed representing

circuit clerk in contract negotiations and judicial/administrative proceedings); *Ness*, 660 F.2d at 521-22 (city solicitor and assistant city solicitor not protected under *Branti* because positions entailed providing legal advice to mayor to implement policy).

In an attempt to create an intra-circuit conflict where none exists, Mr. Diederich also incorrectly states that the Eleventh Circuit, in *Cutcliffe v. Cochran*, 117 F.3d 1353 (11th Cir. 1997), *cert. denied sub nom.*, *Cutcliffe v. Jenne*, 118 S. Ct. 1795 (1998) determined that assistant United States attorneys are protected against patronage discharges and that this decision "undoubtedly encompasses assistant county attorneys." (Petition at 19). In fact, the Cutcliffe Court *upheld* the politically-based dismissal of deputy sheriffs. In a footnote, the Eleventh Circuit, however, cited to Justice Powell's dissent in *Branti* and stated in *dicta* that "we believe *Branti* would not permit the dismissal of all Assistant U.S. Attorneys for patronage reasons." *Cutcliffe*, 117 F.3d at 1357-58 n.4.

First, even if this dicta is considered, the Eleventh Circuit has acknowledged that each case must be decided on its own merits, *id.* at 1358, which is consistent with what was done in this case. *Second*, the dissenting opinion in *Cutcliffe* cogently noted that the remark about assistant United States attorneys (not county attorneys such as Mr. Diederich), was inappropriate:

> It puzzles me as to how the majority in this case can take Justice Powell's comments in a dissent in a case involving Assistant Public Defenders, bring them into this case — which involves county Deputy Sheriffs — and volunteer dicta as to what may or may not be done with respect to the employment of Assistant United States Attorneys.

Cutcliffe, 117 F.3d at 1360 n.3 (Kravitch, J. *dissenting*). *Third*, in circumstances analogous to this case, the Eleventh Circuit has recognized that the First Amendment does not protect all governmental attorneys from dismissal. *See Shahar v. Bowers*, 114 F.3d 1097, 1104 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998) ("we know of no federal appellate decision in which a subordinate prosecutor, state attorney or like lawyer has prevailed in keeping his job over the chief lawyer's objection.").

The result in this case turned on the application of settled legal standards to facts which Mr. Diederich, could not legitimately dispute. There is no conflict between circuits and disingenuously mischaracterizing this fact-bound conclusion as a "*per se*" ruling does not entitle Mr. Diederich to review in this Court.

F. The Second Circuit's Opinion Does Not Conflict With This Court's "Free Speech" Decisions

Mr. Diederich contends that this Court should review the decision below because the Second Circuit's application of *Branti* allegedly chills free speech and creates a conflict with this Court's decisions in *Pickering v. Board of Education*, 391 U.S. 563 (1968); and *Connick v. Myers*, 461 U.S. 138 (1983).

This is not a case involving a dismissal based on the exercise of the right of free speech. If such a claim had been brought, the lower courts would have applied the balancing test set forth in *Pickering* and *Connick* and determined whether the dismissal was proper. Neither *Pickering* nor *Connick* determined whether governmental attorneys are policymakers and in *Connick* this Court determined that the dismissal of an assistant district attorney did not offend the First Amendment. Moreover, contrary

to Mr. Diederich's assertion (Petition at 19), this case does not conflict with the Ninth Circuit's rulings in *Finkelstein v. Bergna*, 881 F.2d 702 (9th Cir. 1989), *cert. denied*, 502 U.S. 818 (1991) and *Johnston v. Koppes*, 850 F.2d 594 (9th Cir. 1988). Both of these cases involve free speech claims — not questions of *Elrod/ Branti* protection. In addition, the Ninth Circuit has ruled that governmental attorneys similarly situated to Mr. Diederich enjoy no protection under *Branti*. *Fazio*, 125 F.3d at 1332.

The protections guaranteed by this Court's free speech cases are not in any way affected by the application of the *Branti* standard to an entirely different situation — dismissal based on political affiliation. Any implication that a public employee has no free speech protection because of the Second Circuit's *Branti* analysis rulings in this case simply ignores those opinions.

II.

MR. DIEDERICH MISSTATES NEW YORK LAW WHEN HE ASSERTS THAT HE WAS PROTECTED FROM POLITICALLY MOTIVATED DISCHARGE

Mr. Diederich claims that, as an employee classified as "non-competitive" pursuant to section 42 of New York State's Civil Service Law, he is protected from politically-motivated discharge and that principles of federalism therefore mandate that this Court similarly protect him. This claim is demonstrably incorrect. Thus, it is not surprising that in making this argument, Mr. Diederich wholly fails to discuss the applicable New York statute that provides protection from patronage dismissals for only certain employees or any of the cases interpreting this statute.

New York's statutory protection from political discharge is set forth in section 107 of the Civil Service Law which states in relevant part:

> . . . no appointment or selection to or removal from an office or employment *within the scope of this chapter or the rules established thereunder*, shall be in any manner affected or influenced by such [political] opinions or affiliations.

N.Y. Civil Service Law § 107 (McKinney 1983 & Supp. 1998) (emphasis added). In construing the scope of the nearly identically-worded predecessor statute, courts focused on the underscored language, which refers to other statutory sections of New York's Civil Service Law and the rules promulgated thereunder. This is because otherwise,

> the section, literally construed, would apply to positions in the unclassified service and would direct that the appointments of heads of departments should not be influenced or affected by their political opinions or affiliations. Manifestly, such a construction was not intended and has never been adopted.

People v. Prendergast, 148 A.D. 129, 133, 132 N.Y.S. 115, 118 (1st Dep't 1911). Accordingly, the *Prendergast* Court held that public employees classified as "exempt" were not protected by section 107 of New York's Civil Service Law from politically based dismissals.

Courts that have specifically examined whether "non-competitive" employees are similarly excluded from the scope of section 107's protection have, *without exception*, determined that such classified employees are subject to dismissal for political reasons. Indeed, the New York Court of Appeals expressly has held,

> [t]he courts have definitely decided that section 25 [now § 107] does not apply to the exempt class. The same reasoning requires a holding that it does not apply to the noncompetitive class.

Merriweather v. Roberts, 268 N.Y. 12, 20, 196 N.E. 621, 624-25 (1935). *See Deth v. Castimore*, 245 A.D. 156, 157-58, 281 N.Y.S. 114, 117 (4th Dep't 1935) ("section 25 [now § 107] of the Civil Service Law does not apply to one holding an appointment to a position in the noncompetitive class"); *O'Connell v. Gorski*, 715 F. Supp. 1201, 1204-5 (W.D.N.Y. 1989) (dismissal of an assistant county attorney classified as non-competitive upheld in part because Court gave "substantial deference to such classification.")

Not coincidentally, Mr. Diederich fails to cite a single case in which the protection afforded by section 107 was held to apply to a public employee classified as non-competitive. Most of the cases cited by Mr. Diederich do not even involve the dismissal of employees for political reasons. *See Ottinger v. Civil Service Commission*, 240 N.Y. 435, 148 N.E. 627 (1925) (involving the constitutionality of statute permitting the appointment of deputies without civil service examination); *Voorhis v. Warwick Valley Central School District*, 92 A.D.2d 571, 459 N.Y.S.2d 325 (2d Dep't 1983) (holding that "noncompetitive" employee had no protectable property interest in position and was not protected from discharge by Civil Service Law § 75). The other case relied on by Mr. Diederich, *Largo v. Vacco*, 977 F. Supp. 268, 272-3 (S.D.N.Y. 1997), dealt with an employee in the exempt class and in no way addressed whether an employee classified as non-competitive was entitled to protection from discharge based on political affiliation.

In the district court, Mr. Diederich expressly recognized that being classified as non-competitive did not protect him from

a politically motivated discharge. (JA 66, ¶ 27 ("the part-time assistant county attorneys felt that their positions were likely targets for the grant of Republican patronage, since these had the civil service status of 'noncompetitive' (exempt from civil service protection")). Thus, in the courts below, Mr. Diederich admitted that the factual premise underlying his argument to this Court is not true. Given his admission and the "substantial deference" Mr. Diederich contends must be paid to the state's statutory scheme (Petition at 11) the correctness of the Second Circuit's ruling should be obvious.

Mr. Diederich's contention that the Second Circuit's alleged failure to respect New York law regarding the protection of employees from politically motivated discharge "imperils federalism" (Petition at 10) is logically inconsistent and irreconcilable with other of his arguments. On one hand Mr. Diederich claims that the Second Circuit impermissibly adopted a *per se* rule that government lawyers do not have First Amendment protection and argues that the teachings of *Elrod* and *Branti* mandate that each case be decided on its own merits. (Petition at 19). On the other hand, Mr. Diederich specifically asks this Court to adopt a *per se* rule — that if an employee is protected by a state's civil service law, then the employee must enjoy First Amendment protection from dismissal.

Branti itself demonstrates the frivolity of Mr. Diederich's *per se* civil service rule because in *Branti*, as Mr. Diederich admits, the plaintiff assistant public defender was an employee *exempt* from civil service protection under New York law. (Petition at 10). If Mr. Diederich's conception of federalism is accepted — and this Court, therefore, is bound to follow the judgment of New York's legislators — this Court could not have found the *Branti* plaintiffs' First Amendment rights to have been

violated. Accordingly, there is no applicable principle of federalism that requires this Court to review the decision below.[4]

III.

MR. DIEDERICH'S OTHER POINTS PROVIDE NO REASON TO REVIEW THIS CASE

A. Mr. Diederich's Section 1983 Claim Is Meritless

Mr. Diederich seeks review because he believes the lower courts' dismissal of his claim that respondents unconstitutionally took $8,000 of his accrued benefits was incorrect. (Petition at 20). Mr. Diederich fails to explain, however, why he believes the manner in which lower courts allegedly erred merits review by this Court.

As the district court explained, Mr. Diederich failed to show that he had a property interest in his accrued benefits and his unlawful takings claim was merely based upon his assertion that respondents breached his contract. (App. 8a). Without a constitutionally protectable property interest, Mr. Diederich cannot prevail on this claim or obtain review of his petition by this Court.

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4. Circuit courts uniformly hold that *Elrod* and *Branti* require a case by case determination and that no one factor, such as a civil service classification, is determinative. *See, e.g.*, *Vezzetti*, 22 F.3d at 486; *Williams*, 909 F.2d at 153 (the Supreme Court "left it to subsequent courts to determine, on a case-by-case basis, whether political affiliation is an 'appropriate requirement for the effective performance of the public office' "); *Jiminez Fuentes*, 807 F.2d at 242 ("a court's function . . . is to do what courts are often called upon to do — to weigh all relevant factors and make a common sense judgment in light of the fundamental purpose to be served").

The cases Mr. Diederich cites do not help his cause. For example, this Court extended First Amendment protection to dismissals of independent contractors based on political affiliation in *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996). *O'Hare* has nothing to do with an unconstitutional taking of property like that alleged by Mr. Diederich. Moreover, the *O'Hare* Court recognized that the independent contractor could be dismissed if the *Branti* standard was satisfied. *O'Hare*, 116 S. Ct. at 2361. Here, as demonstrated above, *Branti* permits the dismissal of assistant county attorneys based upon political affiliation.

B. Testimony From The *Gordon* Trial Is Irrelevant

Mr. Diederich attempts to take respondents' position at the *Gordon* trial — that the assistant county attorneys were not fired for political reasons — and use it to demonstrate that the Second Circuit erred when it decided that political affiliation was an requirement for the performance of Mr. Diederich's duties. (Petition at 12-15). In support of this illogical argument, Mr. Diederich cites to *Gordon* trial testimony and a hearsay statement (Petition at 5), both of which are taken out of context.

Mr. Diederich's argument demonstrates a fundamental misunderstanding of what the Second Circuit decided in *Gordon* as well as in this case. In *Gordon*, the jury had determined that the plaintiffs were fired due to their political affiliation. This finding was not contested on appeal. *Gordon*, 110 F.3d at 887. The Second Circuit held that such politically based dismissals did not violate the Constitution. Whether the *Gordon* defendants denied that the dismissals were based on political considerations was irrelevant to the Second Circuit's *Gordon* decision, and it is irrelevant here.

The lower courts here — for the purposes of a motion to dismiss — assumed that Mr. Diederich was fired for political reasons. The question next addressed was whether such dismissal was constitutionally permissible. That respondents could contend that Mr. Diederich was actually fired for another reason — because he was incompetent, for example — had no bearing on the only question before the lower courts — assuming the dismissal was politically motivated, did it violate Mr. Diederich's constitutional rights? Mr. Diederich's argument does not make sense, and certainly provides to reason for the Court to review this case.

C. Attorneys' Ethical Obligations Are Irrelevant

Mr. Diederich argues that a lawyer's obligation to maintain integrity, exercise independent professional judgment, represent a client completely and avoid even the appearance of impropriety mandate that attorneys be granted constitutional protection from politically based dismissal. (Petition at 20-22). Again, as with other arguments, Mr. Diederich never explains why being subject to dismissal based on political affiliation imperils these ethical directives and justifies this Court's review of his petition. Clearly, for an attorney such as Mr. Diederich who represented the County before the legislature and department heads and consulted with policy-making boards, it is "difficult to fathom how such responsibilities can be undertaken . . . without political and social philosophy [making] a difference in the implementation of programs" (App. 5a) (quoting *Gordon*). This does not mean, however, that Mr. Diederich is committing ethical violations by fulfilling these duties.

If Mr. Diederich's argument were accepted, then no attorney could be terminated based on political affiliation. Such a result is completely inconsistent with this Court's prior decisions as

well as the nine circuit courts that have upheld government attorney termination claims.

D. The Guarantee Clause of the Constitution Is Irrelevant

Mr. Diederich asserts that his dismissal violates the Constitution's guarantee to the citizens of the United States of a "republican form of government." (Petition at 22). He contends that the Second Circuit violated the Guarantee clause by refusing to respect New York's alleged statutory mandate that civil servants be dismissed only "for cause."

Such a claim cannot be considered by this Court. "A long line of Supreme Court cases have constantly reaffirmed the position that [the Guarantee] clause is nonjusticiable" 1 Ronald Rotunda & John Nowak, *Treatise on Constitutional Law*, § 3.4 at 319 (2d ed. 1992 & Supp. 1999); *see Baker v. Carr*, 369 U.S. 186, 223-24 (1962). The cases that Mr. Diederich relies on are not to the contrary. *See Kohler v. Tugwell*, 292 F. Supp. 978, 982 (E.D. La. 1968) (refusing to hold that action is justiciable, stating that "if the decision[ ] in . . . *Baker v. Carr* require[s] reappraisal, it is not proper to do it here and now."), *aff'd*, 393 U.S. 531 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964) (action justiciable under the Equal Protection clause, not the Guarantee clause). The cases cited by Mr. Diederich are also distinguishable in that they involve state's actions that allegedly misled voters. *See Kohler*, 292 F. Supp. at 982; *Burger v. Judge*, 364 F. Supp. 504 (D. Mont.), *aff'd*, 414 U.S. 1058 (1973).

Here, Mr. Diederich alleges that the Second Circuit itself violated the Guarantee clause when it decided that Mr. Diederich enjoyed no constitutional protection, which somehow dismantled "New York's merit system of civil service." (Petition at 22-23). If this is not a Guarantee clause issue, then it is repetitious of Mr. Diederich's "federalism is imperiled" argument. (*See*

Petition at 12) ("The Court of Appeal's antimajoritarian disregard for New York's merit system of public employment . . . is contrary to fundamental principles of federalism")).

In any event, as discussed above, New York law did not protect Mr. Diederich from a politically-motivated dismissal. Moreover, by deciding that Mr. Diederich does not enjoy constitutional protection, the Second Circuit upheld the will of the Rockland County electorate who had decided, through their elected officials, that: (a) Mr. Diederich's employment was at the pleasure of the County Attorney and revocable at any time, N.Y. County Law § 502 (McKinney 1991 & Supp. 1998); and (b) for the purposes of financial disclosure, Mr. Diederich was designated as a "policymaker". *See Laws of Rockland County*, Code of Ethics, § 66.11.1, Schedule A(D)(2) (1992).

Finally, Mr. Diederich's Guarantee clause contentions bare no resemblance to the allegations made in his complaint. As the district court noted, Mr. Diederich asserted in this complaint that "it directly harms democracy, and the republican form of government . . . for public employment decisions to be made on the basis of political patronage." (App. 5a, n.3). Because political affiliation was an acceptable basis for Mr. Diederich's discharge, the courts below correctly dismissed this cause of action. Put simply, like all of his other arguments, Mr. Diederich's Guarantee clause claim does not present this Court with: (a) a novel legal issue; (b) a conflict between circuits; (c) an important legal question that has been decided in a way that conflicts with this Court's decisions; or (d) any other reason to grant review in this case.

CONCLUSION

As Rule 10 of the Rules of this Court states "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." That is all, however, that Mr. Diederich offers and it is clear from the facts and the law discussed above that the Second Circuit's ruling was correct. Nor is the decision in conflict with any decision of this Court or with any other circuit. Accordingly, no intercession by this Court is necessary and the petition for certiorari should be denied.

Respectfully submitted,

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